

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR 30 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ROGER H. CONTRERAS,)	
)	2 CA-CV 2011-0103
Petitioner/Appellee,)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
NANCY L. BOURKE,)	Rule 28, Rules of Civil
)	Appellate Procedure
Respondent/Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. DO200901390

Honorable Kimberly A. Corsaro, Judge Pro Tempore

AFFIRMED

Roger H. Contreras

Sierra Vista
In Propria Persona

Nancy L. Bourke

Naco
In Propria Persona

ESPINOSA, Judge.

¶1 In this domestic relations case, Nancy Bourke appeals from a judgment awarding Roger Contreras primary physical and sole legal custody of their son, X.; child support; and attorney fees and costs. Bourke raises a multitude of claims and arguments, none of which merits reversal and, for the reasons stated below, we affirm.

Factual Background and Procedural History

¶2 The essential facts are not in dispute. Bourke and Contreras had been married for ninety-seven days when Contreras filed for dissolution of marriage. The parties knew at that time Bourke was pregnant with their only child, and twice during the divorce proceedings Bourke traveled to the east coast to seek employment. Prior to the birth of their son, the parties stipulated Bourke would move back to Cochise County and Contreras would pay temporary spousal maintenance. X. was born in March 2010. Following a contested custody hearing and dissolution trial, the court awarded Contreras primary physical custody and sole legal custody of X., awarded Bourke parenting time, and ordered her to pay monthly child support of \$275 per month, plus back child support of \$550. Contreras was awarded \$10,000 in attorney fees and \$777 in costs.

Discussion

¶3 Bourke asserts on appeal that the trial court abused its discretion by denying her motions for attorney fees, improperly modifying the divorce decree, failing to address the substance of her motion for appointment of a parenting coordinator, changing the child's name, and denying her reasonable parenting time. We address each argument in turn.¹

¹Bourke raises a number of additional arguments and sub-arguments which we either do not address or discuss only in part, for reasons as set forth in several footnotes, *infra*.

Rule 47 Motion for Temporary Orders

¶4 Nearly five months after Bourke filed a Rule 47 motion for temporary spousal maintenance, child support, and attorney fees, the trial court heard argument and denied her request for temporary attorney fees.² *See* Ariz. R. Fam. Law P. 47. The court found that both parties had borrowed money to pay for legal fees and both had the ability to earn a substantial income;³ therefore, it reserved its ruling on the issue of attorney fees until the conclusion of the case. Bourke sought special-action relief from that ruling in this court, and we declined jurisdiction. In March 2011, the trial court issued a final order regarding child support, spousal maintenance, and attorney fees, superseding all temporary orders. Ariz. R. Fam. Law P. 47(M).

¶5 On appeal, Bourke asserts the trial court abused its discretion, failed to exercise its discretion, or was arbitrary and capricious when it deferred ruling on her motion for attorney fees until entry of the final decree. *See* A.R.S. §§ 25-324, 25-403.08; Ariz. R. Fam. Law P. 47(D) (unless extended for good cause shown, hearing on Rule 47 motion shall be set not later than thirty days after court receives motion and order to appear). Bourke argues an early award of fees would have enabled her to take more reasonable positions and avoid disadvantage throughout the proceedings; specifically,

²Bourke withdrew her request for spousal maintenance at the hearing, and the court granted her motion for temporary child support.

³Bourke and Contreras are both attorneys in Cochise County and are representing themselves in this appeal.

lack of funds prevented her from hiring an expert witness to rebut psychologist Michael German's custodial evaluation testimony during the contested custody hearing.⁴

¶6 Bourke could challenge the temporary order only by special action. See *Villares v. Pineda*, 217 Ariz. 623, ¶ 11, 177 P.3d 1195, 1197 (App. 2008); see also *DePasquale v. Superior Court*, 181 Ariz. 333, 336-37, 890 P.2d 628, 631-32 (App. 1995) (no available remedy for erroneous transfer of temporary custody when parent failed to timely file for special-action relief). Because Bourke's unsuccessful special action was her only available remedy, and the temporary order is no longer effective, having been superseded by the final order, we cannot grant relief from the temporary order. Accordingly, we do not consider Bourke's arguments on this issue.

¶7 Bourke next contends the trial court abused its discretion in its post-trial award of fees and costs to Contreras. She disputes the court's findings that she had the

⁴Although Bourke was never qualified as an expert witness, she appears to challenge the trial court's ruling striking questions and testimony regarding personality reports she prepared, citing the inapplicable criminal case of *State v. Wood*, 180 Ariz. 53, 881 P.2d 1158 (1994). We will not consider this unsupported argument. See Ariz. R. Civ. App. P. 13(a)(6) (argument shall contain citation to relevant authority). Additionally, Bourke did not provide this court with the entire transcript of Dr. German's testimony and we presume the missing portions support the trial court's rulings. See *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

Bourke also cites *Logerquist v. McVey*, 196 Ariz. 470, ¶ 62, 1 P.3d 113, 133 (2000) (retaining rule of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), for admissibility of expert testimony in jury medical-malpractice case), and a concurring opinion from *In re Maricopa Cnty. Juv. Action No. J-75482*, 111 Ariz. 588, 595, 536 P.2d 197, 204 (1975) (Struckmeyer, J., concurring in part and dissenting in part), for her argument that the court's denial of her fees "deprived her of her only meaningful opportunity to dispute" Dr. German's expert testimony. Neither case aids this court's understanding of Bourke's legal argument and we do not address it further.

ability to earn substantial income, and “appeared to have sufficient monthly resources to pay for legal counsel.”

¶8 We review the award for an abuse of discretion. *Armer v. Armer*, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970). Such an abuse occurs “when a court commits an error of law in the process of reaching a discretionary conclusion.” *In re Marriage of Williams*, 219 Ariz. 546, ¶ 8, 200 P.3d 1043, 1045 (App. 2008). An award of attorney fees under § 25-324(A) requires the court to consider the financial resources of both parties and the reasonableness of positions each party has taken throughout the proceedings. Here, in deciding whether to award attorney fees, the trial court expressly considered information from the parties’ financial affidavits and testimony related to their financial resources and weighed it against the reasonableness of Bourke’s positions throughout the proceedings. Additionally, there was substantial evidence that Bourke “exacerbated the cost of this litigation” due to the “number and nature of the motions brought[,] positions taken therein, and their outcomes,” as the court found. *See Mangan v. Mangan*, 227 Ariz. 346, ¶¶ 27-28, 258 P.3d 164, 170-71 (App. 2011) (affirming fee award to father based on unreasonableness of mother’s actions during litigation, despite disparity in parties’ financial resources); *MacMillan v. Schwartz*, 226 Ariz. 584, ¶¶ 37-38, 250 P.3d 1213, 1221 (App. 2011) (affirming partial award of fees to husband in spite of husband’s ability to pay because wife adopted unreasonable litigation positions, even though wife least able to pay); *Graville v. Dodge*, 195 Ariz. 119, ¶ 56, 985 P.2d 604, 616 (App. 1999) (abuse of discretion standard recognizes trial court’s opportunity to observe

reasonableness of parties' conduct). We defer to the trial court's findings of fact and see no abuse of discretion in its award of attorney fees to Contreras.

Modifications of Divorce Decree

¶9 Bourke next argues the trial court violated Rule 91, Ariz. R. Fam. Law P., and A.R.S. § 25-411 by considering modifications of the divorce decree, under the “guise” of Contreras’s motion for clarification. Following trial, and prior to the final entry of judgment, Bourke filed a “Motion for Clarification” and Contreras responded with a “counter-motion” seeking: (1) return of documents he had requested during trial and not yet received; (2) forfeiture of Bourke’s parenting-time sessions for which she arrives late “by fifteen minutes or more”; (3) an order that Bourke “request” vacation time with X. from Contreras, and that he be authorized to restrict Bourke’s travel to Cochise County; (4) unlimited vacation for Contreras with X. on five days’ notice to Bourke; (5) original medical documentation previously requested during trial;⁵ (6) release

⁵In February 2010, the trial court issued a temporary order accepting the parties’ stipulation that Contreras pay all out-of-pocket medical expenses for Bourke and X. A year later during trial, Contreras testified he had paid all original medical bills which he had been provided, except for Bourke’s contraceptive expenses, and requested termination of his obligation to pay for Bourke’s medical care. In its decree following trial, the court ordered Bourke to provide original medical documentation for outstanding medical bills and relieved Contreras of the obligation to pay for contraceptives. Following the parties’ motions for clarification, the court supplemented its order, finding Contreras had paid all original medical bills which he had been provided, except for contraceptives, limiting reimbursement to expenses incurred prior to February 10, 2011, and giving Bourke thirty days to provide any additional documentation.

Bourke argues the trial court abused its discretion by “retroactive[ly]” limiting her medical-expense reimbursement. In her post-trial motion for clarification she maintained she was unable to provide Contreras with original documentation for unpaid bills because originals had been submitted to the court and not released by the clerk. But she failed to

from any obligation to pay for Bourke's contraceptives; and (7) disclosure of Bourke's medical test results.⁶

¶10 Bourke's citation to § 25-411 is untimely and, in any event, unavailing. Failure to comply with § 25-411 does not constitute reversible error and the time for invoking the statute's protections has passed if noncompliance is first raised on appeal from the final judgment. *See In re Marriage of Dorman*, 198 Ariz. 298, ¶ 11, 9 P.3d 329, 333 (App. 2000). Furthermore, the trial court's order will not be reversed on appeal for alleged noncompliance with § 25-411 absent a showing of prejudice. *Id.* ¶ 12.

¶11 Additionally, Rule 91, which governs post-decree proceedings, is inapplicable because Contreras filed his "counter-motion for clarification" before the decree of dissolution of marriage had been entered. Moreover, Bourke failed to raise Rule 91 noncompliance to the trial court and does so only now in this appeal of the final judgment. Consequently, her argument was not properly preserved for appeal and is therefore waived. *See In re Marriage of Pownall*, 197 Ariz. 577, ¶ 27, 5 P.3d 911, 917 (App. 2000).

identify any specific bills amounting to the "several thousand dollars" alleged outstanding. On appeal Bourke cites no authority for her argument that the trial court abused its discretion in modifying the temporary order. *See Ariz. R. Civ. App. P. 13(a)(6)* (argument shall contain citation to authority). We need not address unsupported claims. *See Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 503, 851 P.2d 122, 128 (App. 1992).

⁶Bourke cites *Leathers v. Leathers*, 216 Ariz. 374, ¶ 19, 166 P.3d 929, 933 (App. 2007), for the proposition that because Contreras did not raise his concerns in his pretrial statement, they were not properly before the court. But the *Leathers* case interpreted A.R.S. § 25-327, applicable to modification and termination of maintenance, support, and property disposition, which does not apply here. 216 Ariz. 374, ¶ 17, 166 P.3d at 933.

Parenting Time

¶12 Bourke next claims the trial court abused its discretion in determining her reasonable parenting time. *See* A.R.S. § 25-408(A). Citing no Arizona authority, she asserts her parenting time has been unreasonably “decreased” because the time she enjoyed with X. pursuant to the parties’ pretrial stipulation and temporary order was greater than the parenting time she was awarded by the custody ruling. She also argues the court inappropriately considered the parents’ contentious relationship as a factor in determining her visitation schedule.⁷

¶13 Section 25-408(A) governs the visitation rights of noncustodial parents:

A parent who is not granted custody of the child is entitled to reasonable parenting time rights to ensure that the minor child has frequent and continuing contact with the noncustodial parent unless the court finds, after a hearing, that parenting time would endanger seriously the child’s physical, mental, moral or emotional health.

We review decisions concerning visitation for an abuse of discretion. *McGovern v. McGovern*, 201 Ariz. 172, ¶ 6, 33 P.3d 506, 509 (App. 2001). The trial court enjoys

⁷Bourke further asserts the trial court abused its discretion and violated her substantive due process rights and fundamental right to “direct the [child’s] upbringing, education, health care, and mental health” by denying her the “right of first refusal” over daycare and other third parties. *See* A.R.S. § 1-601(A). She claims the court failed to find a compelling government interest or danger to the child before denying Bourke frequent and continuing visitation time in favor of the third-party daycare center. *See* A.R.S. § 25-408; *Troxel v. Granville*, 530 U.S. 57, 95 (2000) (parent has liberty interest in “custody, care and nurture of the child”), *quoting Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Although Bourke requested below that she be granted a right of first refusal, she provided no legal authority to support her claim, did not make the arguments she now asserts on appeal, and the court denied her request without comment. We will not consider on appeal arguments not made in the trial court. *See Pownall*, 197 Ariz. 577, ¶ 27, 5 P.3d at 917.

broad discretion to grant visitation rights because it is in the most favorable position to determine what is best for the child, and we will not disturb its decision unless it “clearly appears that the trial judge has mistaken or ignored the evidence.” *Armer*, 105 Ariz. at 289, 463 P.2d at 823. “We will defer to the trial court’s determination of witnesses’ credibility and the weight to give conflicting evidence.” *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d 676, 680-81 (App. 1998).

¶14 Throughout the proceedings both parents requested sole legal and physical custody of X., and evidence regarding the relationships between X. and his parents was disputed. In support of its decision to award Bourke parenting time of two overnight visits per week, one seven-day vacation per year, alternating holidays, and discretionary visits of one hour per day at X.’s daycare facility, without restriction to request additional time from Contreras, the court heard testimony from the parties, family members, and Dr. German, and made detailed findings pursuant to A.R.S. §§ 25-403 and 25-408. The court determined Bourke “appears to instigate unnecessary conflict with [Contreras] and has demonstrated that she will interfere with the child’s relationship with his father,” while Contreras “has not demonstrated he will interfere with the child’s relationship with his mother.” The court classified Bourke as “aggressive and confrontational,” with a “history of depression and suicidal statements” which will “interfere with her ability to parent.” The court also recognized Contreras is “simply more calculated and cunning” than Bourke and “chooses to maintain the atmosphere of dysfunction by recording all encounters with the expectation of trouble . . . creat[ing] an atmosphere of distrust.”

Because it was “clear that the parents need[ed] clear limits concerning parenting time and child exchanges,” the court set out detailed directives to instruct the parties how to exchange their child and communicate with one another. The court’s conclusions are based on evidence in the record and we see no abuse of discretion in its evaluation of that evidence and its determination that the best interest of the child would be satisfied by the aforementioned visitation schedule. *See Armer*, 105 Ariz. at 289, 463 P.2d at 823.

Motion for Parenting Coordinator and Imposition of Sanctions

¶15 During trial, Bourke made an oral motion for the appointment of a parenting coordinator, and the trial court took its ruling under advisement. In the interim, the court ordered Bourke to continue her visitation according to the previous order which provided two overnight visits per week and additional time as the parties agreed, with twenty-four hours’ notice for a home-visit schedule change and thirty minutes’ notice for visitation at daycare. The following week, Bourke filed a written motion which repeated her arguments, followed the next week by an “addendum,” which, again, reiterated her claims. She also included new custody arguments and copies of vituperative e-mails between her and Contreras suggesting she would violate the existing court order. Contreras requested sanctions against Bourke for fees and costs associated with responding to the motion.

¶16 The trial court denied Bourke’s motion and addendum, finding them frivolous and not well-taken for being submitted after the matter had been taken under advisement and “appear[ing] to improperly influence the court’s [March 4, 2011,]

ruling.” And the court granted Contreras’s motion for sanctions against her as a result. Bourke acknowledges the appointment of a coordinator is within the court’s discretion, but, citing only Rule 74, asserts the court’s failure to address the substance of her motion and its imposition of sanctions amounted to an abuse of discretion.

¶17 A trial court has discretion whether to appoint a parenting coordinator if the parties are consistently in conflict, there are serious concerns about the mental health or behavior of either parent, or it would otherwise be in the child’s best interest to do so. Ariz. R. Fam. Law P. 74(A). The trial court’s ruling demonstrates it considered Bourke’s motion and addendum: it noted Bourke had previously made her request at trial and “[u]pon review, it is clear that [Bourke] is unwilling to abide by the court’s orders or respect the decisions of [Contreras] concerning extra parenting time.” The court duly considered Bourke’s arguments and we cannot say it abused its discretion by denying her request for a parenting coordinator. *See Gutierrez*, 193 Ariz. 343, ¶ 22, 972 P.2d at 682.

¶18 Additionally, the trial court had discretion to issue sanctions for frivolous motions. Ariz. R. Fam. Law P. 31(A); *see also* § 25-324(A) (trial court has discretion to award attorney fees against spouse that takes unreasonable positions). The court pointed out that Bourke had filed her motion and addendum while the trial ruling was under advisement, and the “nature and status” of the case led the court to find the motions frivolous. Although the court acknowledged “the added stress [on Bourke] of waiting for [its] final ruling post trial,” it determined Bourke’s repetitive filings after the close of evidence and re-arguing trial issues were attempts to “improperly influence the court’s

ruling.” Bourke’s motions re-asserted her trial positions and detailed the parties’ ongoing custody disputes from her perspective. Moreover, Bourke’s motion and addendum indicated she had attempted to violate the court’s visitation orders on several occasions by, among other actions, interfering with Contreras’s temporary custodial rights to obtain medical care for X. and asserting a claim to extra visitation at daycare without Contreras’s prior agreement. Because the court’s finding that Bourke’s motion was frivolous is not clearly erroneous, particularly when viewed in light of Bourke’s history of filing unsubstantiated motions, we find no abuse of discretion in the court’s award of sanctions against her. *See Mangan*, 227 Ariz. 346, ¶ 28, 258 P.3d at 170 (upholding attorney fee award to father, based, in part, on mother’s unreasonable positions throughout proceedings); *cf. James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Protection*, 177 Ariz. 316, 321, 868 P.2d 329, 334 (App. 1993) (upholding fee award as sanction pursuant to Rule 11, Ariz. R. Civ. P., for the filing of unsubstantiated pleading with purpose of causing delay).

Child’s Name Change

¶19 We lastly address Bourke’s assertion that the trial court committed legal error and abused its discretion “based on clear factual error” by granting Contreras’s motion to change X.’s surname to his, over Bourke’s objection. She argues the court improperly gave greater legal weight to the paternal name, in violation of *Pizziconi v. Yarbrough*, 177 Ariz. 422, 425, 868 P.2d 1005, 1008 (App. 1993). *Pizziconi* does not require a court to make express findings before granting or denying a request for

changing a child's name, but only requires consideration of the best interest of the child. *Id.* Here, the court expressly determined it was “in the best interest of the minor child to bear the last name of his father and sole legal custodian” pursuant to A.R.S. § 12-601(B). Because the court properly considered X.'s best interest and reasonably concluded it would be best served by sharing the name of his custodial parent, we find no abuse of discretion.

Disposition

¶20 For the reasons set forth above, we affirm the judgment of the trial court. Contreras has requested his costs of appeal; as he is the prevailing party, we award them contingent upon his compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge